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Where Reason and Common Sense Forbid to Tread*

A paper examining the history and current use of punitive legal actions against pregnant women in the United States of America

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Introduction

In early August in 1969, the Southern California summer evening gave way to a fiery sunset in the ravine-like Benedict Canyon. The warm and wild canyon was home to some of Hollywood's richest and most famous – a secluded paradise in the Santa Monica Mountains; far enough away to make residents feel removed from the concrete jungle of Los Angeles. Benedict Canyon was a peaceful place, away from the everyday helter skelter of a city that never stops.

The secluded paradise was forever changed the evening of August 8th when some of the most brutal murders in American history took place. Of that night's tragedies, the slaying of twenty-six-year-old Sharon Tate and her eight-and-a-half-month old fetus shook the nation. Members of the notorious Manson Family killed Tate, her viable fetus and four others that night. Showing no mercy, they stabbed Tate multiple times specifically targeting her swollen abdomen and used the victims' blood to paint the word "pigs" on the living room wall.

The brutality of the crimes shocked the nation. Since the 1969 murder of Tate, laws designed to 'protect' the unborn by charging perpetrators under criminal statutes have been on the rise. (National Council of State Legislatures, 2015)

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* *Johnson v. State*, 602 So. 2nd 1288, 1297 (Fla.1992) The court acknowledged the extraordinary consensus among medical groups condemning prosecutions of drug-addicted pregnant women as counter productive and dangerous. In their 1992 opinion, the Supreme Court of Florida overturned the conviction of Jennifer Johnson for drug delivery to her fetus, declaring : "The Court declines the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread." (Flavin & Paltrow, 2010)

Protections for the Unborn: Creating Maternal-Fetal Conflict

Members of the Manson family were convicted for the murders at Tate's house, but not for the slaying of her viable unborn son.[a] Whereas, the 2002 murder of Laci Peterson and her eight month old fetus, led to her husbands conviction for one count of first degree murder and one of second degree murder respectively.[b] Prior to 1973 there were few state level criminal laws concerning the death of the unborn; currently there are at least 38 states with fetal homicide laws, at least 23 of these states' laws apply to the earliest stages of pregnancy. (National Council of State Legislatures, 2015) The murder of Laci Peterson and her fetal son led to the passage of federal legislation widely known as *Laci and Conner's Law*. The 2004 Unborn Victims of Violence Act[c] created a separate legal offense and enhanced sentences if a fetus, at any stage of development, was killed during the commission of certain federal crimes. However, the law did not classify crimes against pregnant women as separate federal offenses when a pregnant woman is assaulted or murdered.[d] Thus, federal legislation criminalizes acts against the fetus with enhanced charges and sentencing, without recognizing the pregnant woman herself as the victim. (ACOG Committee on Ethics, 2005)

More recently, the 2014 grisly stabbing of Michelle Wilkins in Colorado grabbed headlines and spurred on the development of new legislation that specifically criminalized acts against the unborn, as persons in their own right. Dynel Lane lured

[a] People v. Manson, et al., Los Angeles Superior Court Case No. A 253 156.(1972)
[b] People of California v. Scott Lee Peterson, Stanislaus Superior Court Case No. 1056770 (2004)
[c] The Unborn Victims of Violence Act, 18 USC §1841; 10 USC §919a
[d] *Id.*

Wilkins to her Longmont, Colorado home via a Craigslist ad selling used baby clothes. Lane subsequently performed a crude Cesarean surgery on Wilkins, cutting the eight-month-old fetus from her body and leaving Wilkins to die in the basement.[e] However, Colorado stopped short of codifying feticide legislation as being a crime perpetrated against the fetus. Rather, the 2013 *Crimes Against Pregnant Women Act*, "a court shall sentence a defendant convicted of committing specified offenses *against a pregnant woman*, if the defendant knew or reasonably should have known that the victim was pregnant."[f] The Colorado statue is almost novel in that it refers to crimes against a pregnant woman, rather than crimes against the fetus. Lane was convicted with the attempted murder of Wilkins, four felony assault charges and one count of unlawful termination of a pregnancy, also a felony. The stated contended that Wilkins' fetus did not take a breath and thus lane could not be charged with its murder.[g] Colorado reminds us that without the particular pregnant woman, there is no fetus to protect – that their needs necessarily converge - as if their interests were divergent.

Historically, feticide laws in the United States have been written to specifically exempt the woman from legal culpability, allowing for abortion and prosecution of the culpable actor when a fetus is viable.[h] Feticide laws are one example of the neo-

[e] *People of the State of Colorado v. Dynel Catrene Lane*, Boulder County Court Case #15CR567 (2016)
[f] Colo. Rev. Stat. §18-1.3-401 (13); emphasis added

[g] *People v. Lane* (2016)
[h] Louisiana - La. Rev. Stat. Ann § 14:32.5 defines feticide as the killing of an unborn child by the act, procurement, or culpable omission of a person other than the mother of the unborn child. North Carolina - 2011 N.C. Sess. Laws, Chap. 60 (HB 215) defines murder, voluntary manslaughter, involuntary manslaughter, assault inflicting serious bodily injury and assault of an unborn child. "Unborn child" is defined as a member of the species Homo sapiens at any stage of development, who is carried in the womb. Carolina* These provisions do not apply to lawful acts that cause the death of an unborn child as defined in N.C. Gen. Stat. § 14:45.1 , acts that are committed in the usual standards of medical practice or

conservative effort to undermine key holdings in *Roe* and outlaw abortion in the United States. (Burke, Forsythe, Paprocki, & Smith, 2016; Forsythe, 2012) By codifying "life" as beginning at conception for the purposes of criminal law, state legislatures are supporting an agenda that seeks to undermine choice, privacy and ultimately women's liberty. Feticide laws originally meant to "protect" the unborn and the women who carry them are now being used to prosecute the pregnant woman, as if her fetus is a person separate from her, rather than a wholly dependent developing fetus that grows in her womb. Society has a deeply rooted and profound interest in protecting human life, but, as Sylvia Law has noted, "the sustenance the fetus needs is not society's to give. It can only be provided by a particular pregnant woman." (Kaplan, 2011)

These claims of fetal rights, and more recently of personhood, fail to recognize that a pregnant woman is a person in her own right. Such legislation places a pregnant woman in the unenviable position of being in conflict with her fetus – sometimes compelling her to put the needs of the fetus before her own.

En face feticide and forced interventions may seem like two separate issues. However, they both allow pregnant women to be treated differently from all other women. Whether the health needs of a pregnant woman and her fetus are convergent is a legal, clinical and ethical conundrum rightly described by Annas, "before birth, we can obtain access to the fetus only through its mother, and in the absence of her

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acts committed by a pregnant woman that result in a miscarriage or stillbirth. (National Council of State Legislatures, 2015)

informed consent, can do so only by treating her as a fetal container, a nonperson without rights to bodily integrity." (American College of Obstetricians and Gynecologists, 2005; Annas, 1987) Blaming women for pregnancy loss, prosecuting them for real or imagined harm and ignoring their refusal to grant informed consent are all infringements upon liberty that can only happen when a woman has been placed into a separate class – the class of pregnant woman. She has a right to bodily autonomy, to make private medical decisions, and importantly in the American context – to liberty.

> Of liberty I would say that, in the whole of plentitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. **I do not add 'within the limits of the law,' because law is often but the tyrant's will, and will always so when it violates the right of an individual. –** Thomas Jefferson[i] (emphasis added)

We forget that pregnancy in itself is inherently risky – in fact, it's one of the most dangerous physical states for a woman to be in. The United States has seen a 128% rise in the maternal mortality ratio over the past 10 years. (Alkema et al., 2014; Kassebaum et al., 2014) Every fetal intervention, those requiring either informed consent from the pregnant woman or a court order to forcibly apply the intervention, affects the pregnant woman's bodily integrity and health. When we decline to treat the whole patient, provide accessible quality preconception, pre-natal and post-natal healthcare

[i] Thomas Jefferson to Isaac H. Tiffany, 1819; parting with Montesquieu, Jefferson affirms the fundamental notion that individuals posses "inherent and inalienable rights." The limits to liberty, which Montesquieu endorsed in his *Spirit of the Laws* Book XI, Chapter 3, elucidates the tension between individual rights and the societal imperative of governmental order that necessitates the limiting of individual liberty. "Political liberty does not consist in an unlimited freedom. In government, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will." (Destutt de Tracy, Antoine,Louis Claude, 1811)

we as a society are the negligent actors – culpable for the negative outcomes suffered both by pregnant women and their fetuses.

Those who support a neo-conservative agenda have made a targeted effort to chip away at the protections set down in the landmark Supreme Court decision *Roe v. Wade*.[j] This agenda is at the heart of new laws, reinterpretations of current statutes and an anti-choice judiciary determined to reverse centuries of common law and scientific reason though a series of opinions designed to establish a new legal precedent for when life begins. There is a disturbing national trend, which has caused and continues to cause real and potential harms to women, in particular, and society in general.

Examining Issues Threatening Women's Liberty

Part I examines America's roots in English common law, early legal precedent surrounding abortion, and the seismic shift in the sphere of pregnancy and family planning away from women and midwives to a newly minted medical establishment and state legislatures. Part II discusses the new role state legislatures are forcing physicians to play as care providers and agents of the state, and how this risks driving women who need prenatal care most away from seeking it. Part III looks at the constantly shifting sand underneath the legal foundation of when life begins, illustrated by cases throughout the past few decades that have actively limited a woman's liberty placing her in the unenviable position of being embattled with her fetus. Part IV concludes this

[j] Roe v. Wade, 410 U.S. 113 (1973)

paper by arguing that when we cede liberty to potential, but unviable life, we risk not only women's lives but the very essence of what it means to be American, by limiting the very liberty we fought so hard to win.[k]

Rather than juridical reactivity, we need to actively support women and their families with access to highly effective family planning, accessible pre-natal care, safe and supportive intra-partum care and appropriate post-partum maternal and newborn care. These common sense needs have been consistently undermined by neo-conservative's and their agenda to codify personhood protections at the state-level in order to ultimately undermine the Court's key holdings in *Roe.*

Part I

Law and the Medicalization of Birth in America

The battle over abortion in the United States is nothing new; it has been waged since just before the turn of the last century, when abortion was criminalized – for the first time. The legal status of abortion was widely accepted by 1800, with nascent American courts utilizing British common law to guide their decisions surrounding cases or controversies. The principle guiding centuries of common law regarding abortion and culpability for pregnancy loss was the period in normal gestation known as quickening.[l]

[k] The argument that the Founders held liberty, and indeed all of the inalienable rights, to be those of *men* is an irony not lost on this author. Nor indeed is the cruel paradox of slave owners penning their belief in freedom from tyranny. While seemingly at odds with the social mores of the day, we must allow that these writings on liberty were an example of 'deeds one in words,' when the power of rhetoric ought to be more lasting than the mere actions of mortals who owned slaves and believed that *woman* was little more than property that ought to be shielded and protected by a husband. (Campbell, 1990)

[l] "Quickening" (literally, "coming to life") occurred when the pregnant woman first felt fetal movement. St. Thomas Aquinas said that life is manifested principally in two kinds of actions: knowledge and movement. In quickening the fetus becomes a being in possession of a soul. In British canon law, such offenses were ecclesiastical in nature and in the purview of church courts. Henry de Bracton, a thirteenth

Under common law an abortion occurring before quickening was legal. One occurring after quickening could be considered illegal; however, someone could only be charged for murder when the child was born alive.[m] In *Roe v. Wade* the Supreme Court cited Coke's Institutes as evidence that under English common law abortion performed before quickening was not an indictable offense.[n]

Until the 1880's abortion, prior to quickening, was legal and within the purview of women and midwives. The late nineteenth century and beginning of the twentieth century ushered in a nascent profession that would become medical science. (Mohr, 1978) The rigorous standards for medical training and certification exams set by states and professional boards of medicine that we know today cannot be wholly applied to the profession in late nineteenth century America. While some physicians held medical degrees, there was no standard applicable across jurisdictions or entire states. Indeed, prior to the Civil War, medical schools in America were often privately run and accepted any and all paying students; they were perhaps akin to some of the twenty-first century for-profit schools where, rather than quality educational training, the schools' mission appears to be increasing profits by turning out students with 'degrees'. (Barry, 2005; Mohr, 1978) As quackery grew in the United States, 'regular' physicians sought to

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century judge and contemporary of Aquinas stated, "If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the fetus is already formed or quickened, especially if it is quickened, he commits homicide." (Roe v. wade.1973, De Bracton, 1968) Four centuries later, Sir Edward Coke's *Institutes of the Lawes of England* laid the foundation for common law. This shifted the law from canon law to common law, where the "born alive" rule was established. Coke stated, "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the child dyeth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if he childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura [in existence], when it is born alive."

[m] *Roe v. Wade*, 410 U.S. 113 (1973)

[n] Id.

protect their reputations from 'irregulars' by pressuring state legislatures into passing laws outlawing certain practices they deemed governed by the medical field.[o] (Mohr, 1978) 'Regular' physicians of the mid to late 1800s, in their quest to bring legitimacy to the practice of medicine, consolidated their power and influence into medical associations and powerful state medical boards. The American Medical Association was key in consolidating all activities surrounding birth – from abortion, pre-natal care, and delivery itself – under the direct purview of physicians. Thus was born the medicalization of birth. (American Medical Association, ; Mohr, 1978)

With medicalization of birth, the long-held common law principle that pregnancy loss before quickening[p], whether induced or not, was within the purview of women and not physicians or the courts swiftly changed. From the mid nineteenth century into the early twentieth century, restrictions over women's reproductive health grew in number. From regulations over access to birth control[q] to individual state anti-abortion statutes,

[o] While factual, my description of nascent medical science, its consolidation of power and the medicalization of practices once reserved for women and midwives is simplistic, omitting the detailed and nuanced legal changes happening at the state and federal levels in the mid-1800s. For a detailed account of the history of abortion in early America, the state and federal statutes that first began to regulate the field of medicine and the beginning of the medicalization of birth (removing birth from the sphere of women and midwives, who were deemed irregular practitioners with no real medical education) please see Mohr's account in *Abortion in Nineteenth-Century America*.

[p] James Wilson, a contemporary of Thomas Jefferson and a fellow framer of the U.S. Constitution described the common law as it applied to quickening and abortion: "With Constituency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and in some cases, from every degree of danger." (Wilson, 1790) Precedent in American jurisprudence is still found in Wilson's description of natural rights. These natural rights are one reason why one has the right to procreation and why we cannot require examinations before someone becomes a 'natural' parent, but we can have strict regulations for who can adopt or foster a child who has been taken into public care.

[q] The Comstock Act was federal legislation for the "Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use," passed by the US Congress on March 3, 1873, that criminalized the use of the U.S. Postal Service to send erotica, contraceptives, abortifacients, sex toys or any information about these devices. While it was only applicable to those items sent through the federal

common law was challenged by American state legislatures and influential medical associations interested in exerting their power over all medical activities. While women's rights activists often refer to this power play negatively, it is important to note that the legitimacy and credibility of medical science began when the American Medical Association lobbied for the professionalization of and standardization of the field. (Barry, 2005)

Legal skirmishes between proscriptive morals and the rights of physicians to provide reproductive health care to their patients have been ongoing since the federal Comstock Act[r] interfered with birth control devices being shipped through the mail. In 1936, a federal appeals court ruled that the government could not interfere with physician based provisions of contraception to patients.[s] However, until the 1956 Supreme Court decision in *Griswold v. Connecticut*, state-level Comstock-type morality laws still applied to contraception provided within the states.[t] The 1956 decision only applied to marital relationships; it was not until 43 years ago, in *Eisenstadt v. Baird*, that

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mail system or in the District of Columbia, individual states passed similar "vice" laws. Laws to suppress vice were wholly moral in nature; limiting access to contraception is therefore an American battle nearly a century and a half old.

[r] The Comstock Act 17 Stat. 598

[s] *United States v. One Package of Japanese Pessaries*, 86 F.2d 737 (2d Cir. 1936) The Second Circuit Court of Appeals struck down provisions of the Comstock Act and held that the federal government could not interfere with shipments that originated from a physician. Judge Augustus Noble Hand wrote, "While it is true that the policy of Congress has been to forbid the use of contraceptives altogether if the only purpose of using them be to prevent conception in cases where it would not be injurious to the welfare of the patient or her offspring, it is going far beyond such a policy to hold that abortions, which destroy incipient life, may be allowed in proper cases, and yet that no measures may be taken to prevent conception even though a likely result should be to require the termination of pregnancy by means of an operation. It seems unreasonable to suppose that the national scheme of legislation involves such inconsistencies and requires the complete suppression of articles, the use of which in many cases is advocated by such a weight of authority in the medical world." (86 F. 2d. at 739-40)

[t] *Griswold v. Connecticut*, 381 U.S. 479 (1965), invalidated the Connecticut state law prohibiting the use of any drug, article or instrument for the purpose of preventing contraception on the grounds that it violated the right to marital privacy and the right to protection from governmental intrusion.

the holding in *Griswold* was extended to unmarried persons.[u] The irony of withholding contraceptives while allowing abortion was not lost on Judge Hand in his ruling nearly a century ago:

> (I)t is going far beyond such a policy to hold that abortions, which destroy incipient life, may be allowed in proper cases, and yet that no measures may be taken to prevent conception even though a likely result should be to require the termination of pregnancy by means of an operation. It seems unreasonable to suppose that the national scheme of legislation involves such inconsistencies and requires the complete suppression of articles, the use of which in many cases is advocated by such a weight of authority in the medical world.[v]

However, today's Court has utilized the Religious Freedom Restoration Act to deny women access to contraception[w] at the same time legislatures are curtailing access to abortion and utilizing civil laws to force interventions and allow for pregnant women to be criminalized for fetal harm. In the United States it is neither illegal to commit suicide nor to 'be high' on illicit or illegal substances. It is, however, illegal to *attempt* to commit suicide and to *possess* illicit or illegal substances. In 2011 Bei Bei Shuai, a Chinese-American woman, was convicted of feticide in Indiana when she miscarried after a failed suicide attempt.[x] After spending one year in prison, Shuai was eventually released when she pled guilty to a lesser charge.[y] Criminalizing pregnant women with mental health needs violates her right to liberty and bodily integrity and does nothing to

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[u] *Eisenstadt v. Baird*, 405 U.S. 438 (1972), ruling that a Massachusetts law prohibiting the distribution of contraceptives to unmarried people violated the Equal Protection Clause of the Constitution. This decision implied that it was the right of both married and unmarried couples to engage in nonprocreative sexual intercourse. However, this ought not be considered a 'right to any type of sexual intercourse,' as many other types of sexual activity were still outlawed in states.

[v] *United States v. One Package of Japanese Pessaries*, 86 F.2d 737 (2d Cir. 1936)

[w] *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2571 (2014)

[x] *Indiana v. Bei Bei Shuai* (2011)

[y] Shuai v. State, 49A02-1106-CR-486 (IN 2012)

improve maternal or fetal health. (Paltrow, Lynn M., et al., 2011) According to the state's own report, suicide is one of the leading causes of death in Indiana and females die more frequently from suicide by poisoning than by any other cause. (Indiana State Department of Health, 2007) Society has a vested interest in protecting current and future generations. However, laws that criminalize pregnant women for behaviors that may harm their fetuses are premature. Without adequate provisions for care we are harming some of society's most vulnerable – pregnant women in need of healthcare, not jail. As Paltow, et al., (2011) so aptly put it, "Pregnancy is not a panacea for mental illness." While a blissful time for some, pregnancy is also a time of great stress and not necessarily an event that brings joy, when fetal interest supersede those of the pregnant woman we forget that *their* needs necessarily converge, removing the pregnant woman's personhood, her right to bodily integrity and liberty. Begging the question, "How long must women wait for liberty?"[z]

Part II

Informed Consent: The Right to Bodily Integrity

As a society we ask much of our women, in an inherently unequal fashion. We ask that women choose between raising a family or being at the top of their professional field; we assume they will take on the role of caregiver, and should a woman choose not to have children or be less nurturing than others we deem her unnatural. All too often women support the ambition of their husbands, commonly at the expense of their own

[z] One of two popular slogans held by the 'Silent Sentinels,' members of the women's suffrage movement who stood daily outside of the Wilson Whitehouse, beginning on January 10, 1917. http://memory.loc.ammem/today/aug28.html

dreams and desires. Perhaps women do this unconsciously, or willingly, or because they have no other option. Social roles or mores continue to bolster this inequity, limiting women's liberty even in the twenty-first century.

Women are the nurturers of human life – while unable to create this life alone, they alone can grow and develop a fetus into a child. As a society, we believe in protecting the vulnerable among us, that it is our responsibility to ensure that children are born into this world as healthy as possible. Recalling Law's observation, "the sustenance of the fetus is not society's to give. It can only be provided by a particular pregnant woman." (Kaplan, 2011) This makes navigating the ethical waters of restricting the potentially harmful, but legal, behaviors of pregnant women difficult. It is a very human prejudice, wanting to blame someone. When there are adverse pregnancy outcomes – pregnancy loss, birth defects, stillbirth – human nature asks, "why?"

Analogous to the protected privacy of individuals[aa] and that in marital relationships is the ethical and legal principle of physician-patient confidentiality.[bb] For a physician to be able to provide care to a patient it is of paramount importance that the physician know what the patient has been doing – what medications, legal or illegal she

[aa] There is no Constitutional right to privacy; however the court has upheld a persons' right to make private decisions in *Griswold, Eisenstadt, and Roe.*

[bb] The legal concept of physician-patient privilege protects communications between a patient and his/her physician from being used in court. A common law tradition (that may not be statutory in all states), the extent of privilege varies by jurisdiction in the United States; Federal Rules of Evidence do not recognize this privilege. In addition to the common law tradition, medical ethics views the confidential nature of physician-patient relationship as a tenet of medical practice, emanating from the Hippocratic Oath. "Whatever, in connection with my professional service, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret."

has been taking, what symptoms she has, what she has been exposed to. Increasingly, women are unsure whether to confide in their physicians, scared to divulge a past or present struggle with an addiction – to legal or illegal substances. (L. M. Paltrow, 2013) There is a utility to this confidentiality rule; while someone might have a drinking habit that that she or he doesn't want shared with an employer, for example, the physician needs to know in order to manage care. (Appel, 2011) While the law has confined privilege to knowledge acquired during the course of providing medical services, there are certain situations wherein physicians are required to break that confidence. Physicians, like others in a position to safeguard the public, are mandated reporters who have a duty to report matters of public welfare – child abuse, gunshot wounds, etc. Yet where pregnant women are concerned, legislatures, attorneys general and district attorneys are using physicians as de facto investigators and law enforcement agents, requiring them to contravene all laws and ethics surrounding confidentiality and report suspected behaviors to authorities.[cc] By doing so, we risk driving those who need prenatal care the most away from seeking it.

Increasingly state legislatures and district attorneys are actively limiting women's liberty by criminalizing behavior during pregnancy and blaming women for negative birth outcomes. Wisconsin's "cocaine mom law," a statute within the Children's Code, allows the state to take a pregnant woman into custody if it believes, "the expectant mother habitually lacks self-control in the use of alcohol beverages, controlled

[cc] *State v. Lowe* (Wisc. Cir. Ct. Racine County June 15, 2005); *McKinght v. State*, 661 S.E.2d 354, 358 n.10 (S.C. 2008); *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (L. M. Paltrow, 2013)

substances or controlled substance analogs."[dd] The language in this rule is vague and allows the district attorneys too much latitude to rely on personal moral judgment to decide what 'habitually lacks self-control' looks like. This statute was used to forcibly detain Rachael Lowe after she voluntarily sought help from her physician for her addiction to Oxycontin. Lowe was forcibly detained and moved to a psychiatric ward, where she was held against her will. While in custody, Lowe received no prenatal care and was prescribed numerous medications of questionable benefit to her, and of potential harm to her fetus. Medications were of questionable benefit because there is no evidence that Lowe should have been in a psychiatric ward in the first place and as an involuntary patient Lowe was required to take the medication Xanax. Xanax is a Schedule IV controlled substance and is a Category D pharmaceutical. Category D pharmaceuticals have been proven to have a positive evidence of risk to a fetus.[ee] While her fetus received legal representation in the form of a guardian ad litem, Lowe herself was not appointed counsel until after her first commitment hearing. At a subsequent hearing a physician testified that, "Lowe's addiction posed no significant risk to the health of the fetus." (L. M. Paltrow, 2013) The court announced Lowe would be released, but she was held in custody for several days after the ruling and was under state surveillance and supervision for the rest of her pregnancy. As a result of this state intervention, Lowe missed multiple days of work and was subsequently fired.[ff] A

[dd] Wis. Stat. Ann. § 48.193 (L. M. Paltrow, 2013).
[ee] According to the FDA, Category D means that "There is positive evidence of human fetal risk based on adverse reaction data from investigational or marketing experience or studies in humans, but potential benefits may warrant use of the drug in pregnant women despite potential risks." (http://chemm.nlm.nih.gov/pregnancycategories.htm)
[ff] *State v. Lowe* (Wisc. Cir. Ct. Racine County June 15, 2005) (L. M. Paltrow, 2013)

situation like Lowe's raises concerns over conflicting expert opinions of physicians and allowing the legal system to determine risk even in the face of contradictory scientific evidence. It could be argued that the state caused more harm to Lowe, her fetus and her family by forcibly detaining her, compelling her to take medication with a proven risk of fetal harm and causing her to lose her job thereby putting her family in financial risk. When personal morality is allowed to be the gauge for risk, rather than the science of epidemiology, the legal system is weakened. (Minkoff & Marshall, 2016)

Part III

Personhood and when life begins

By prosecuting women for unintentional harm (real or imagined), lawmakers pit women against their fetuses. Increased civil liberties and rights of the unborn are wholly at the expense of the one who nurtures, grows and protects that developing life: the pregnant women, the mother. (Minkoff & Paltrow, 2006) As an ethical society, we are bound to protect the weakest among us. Thus, the question must rationally be a determination of when life begins. The goal of anti-choice ideologues is the complete and total reversal of Roe. (Burke et al., 2016; Forsythe, 2012; Martin, 2014) By exploiting the weakest chink in the armor of a ruling designed to ensure the right to privacy when making personal medical decisions, personhood advocates[gg] have been drawing a

[gg] At the forefront of the personhood movement is the organization Personhood USA. They advocate personhood rights ought to be given to a fertilized egg, before implantation and the establishment of a clinical pregnancy. According to their education page, "There is no longer any debate over whether the human being in the womb is alive: science has unequivocally demonstrated that a unique human life begins at fertilization. Pro-choice advocates admit this, but object that although the human being in the womb is alive, it is not a person with value. They point to certain contemporary philosophers—like Peter Singer and Steven Pinker—who suggest that personhood can only be assigned to individuals who are self-aware, have memory of the past and anticipation of the future, or have a high enough IQ?"

roadmap that they believe will lead to the overturn of *Roe*.[hh] (Burke et al., 2016; Forsythe, 2012) They could be right.

In his majority opinion in the landmark *Roe* decision, Justice Harry Blackmun asserted: "If this suggestion of personhood is established, [Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [14th] Amendment."[ii] This assertion has given the anti-choice movement their direction: with the establishment of fetal personhood, the US Constitution would no longer default to protect the individual woman's right to privacy and thus elective abortion. While *Roe* establishes the right to a legal abortion, it does allow states to create policies they deem necessary for the public safety. In some states, Texas for example, abortion is legal in all but name only – targeted restrictions of abortion providers (TRAP) laws have been effective at limiting access.

During the first half of 2015 alone 51 abortion restrictions were enacted across the United States, 282 have been enacted since 2010. (Guttmacher Institute, 2015a) However, these new laws haven't stopped abortion from being legal in America. What they have done is place a greater burden on women seeking to exercise their right to a

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(http://www.personhood.com/education) Their vision statement, "Personhood USA exists to change the cultural mindset through action to respect the dignity of the human person." (http://www.personhood.com/about) The goal of Personhood USA is an ideological paradigm shift – to convince Americans that a fertilized egg has the same rights and protections under the law as a newborn, a six year-old, an adult, etc.

By legally establishing a fertilized egg as a person, personhood advocates could effectively outlaw abortion by legally equating it to murder. Additionally, as the enforcement of laws throughout the United States shifts to granting increased rights and protections to a fetus it will necessarily expand the untenable conflict of mother vs. fetus. It is a zero sum game – more rights for a fetus means fewer rights for the mother.

[hh] If personhood can be established, that a fertilized egg, embryo, or fetus is given the same rights held by animate, breathing, independent persons the ruling in *Roe* could be invalidated. (Crist, 2010, Goodwin, 2014, L. M. Paltrow, 2013)

[ii] *Roe v. Wade*, 410 U.S. 113, 157 (1973)

legal abortion and put undue restrictions on providers. Regulations and restrictions are enacted under the guise of protecting women but they are unjustified by data and can easily be considered moral and ideological in nature. Childbirth poses a greater risk to women in America than does abortion. The risk of death during childbirth is 14 times higher than the risk posed by abortion. (Alkema et al., 2014; Benson Gold & Nash, 2013) In fact, the United States is the only developed country on Earth to have seen an increase in maternal mortality; in the past decade maternal mortality has increased by 128%. (Alkema et al., 2014) Complications during abortion affect less than 0.3% of patients, and the risk of death during the first trimester – when the majority of abortions are performed – is four in one million. (Benson Gold & Nash, 2013)

Many in the medical establishment fear a greater harm to the public's health, rather than an actual increase in safety. (Guttmacher Institute, 2015b) Scientific evidence demonstrates abortion is a safe medical procedure, enforcement of existing safety regulations, rather than new legislation, would be enough to ensure the continued safety of women in outpatient settings. However, TRAP laws require things such as: a mandatory 24-hour waiting period, scripted counseling (written by legislators, not medical providers), admitting privileges at local hospitals, and requirements that clinics must adhere to the same standards as outpatient surgical centers. (Benson Gold & Nash, 2013) In addition to TRAP laws there has been a wave of regulation that is solely ideological in nature such as waiting periods for women to receive an abortion and required viewing of ultrasounds sometimes accompanied by mandated information that a physician must deliver. After years of successfully defeating such regulations,

2015 ushered in sweeping new restrictions in North Carolina, including a new rule that will certainly be challenged in the courts. Provisions of the new law, *The Women's and Children's Protection Act of 2015*[jj], including a 72-hour waiting period to obtain an abortion, went into effect in 2015. Additionally, on January 1, 2016 the state is now requiring all abortion providers to send records to the state Department of Health and Human Services for all abortions after the 16th week of pregnancy – these include fetal measurements and ultra-sound images. The state claims that these records are for statistical purposes only, however medical and surgical abortions are already reported to the state for statistical purposes. What further protections can such a provision provide?

Anti-Choice ideologues champion such legislative moves. In fact, they prescribe them in the annual 'Defending Life' report, providing the blueprints for legislation that purports to protect women. (Burke et al., 2016) IN reality, these types of legislative actions infringe upon a woman's liberty and her right to bodily autonomy. (ACOG Committee on Ethics, 2005)

Personhood amendments are a relatively recent phenomenon post-*Roe*, where the trimester model and a legal definition of viability became precedent.[kk] The advancement of medical technology has, in some instances, extended viability to early pre-term births, creating a conflict that scientific evidence and the law is trying to parse. Thus, if the period of viability has truly changed and legal precedent can be established,

[jj] North Carolina HB 465, ratified June 4, 2015. (http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H465v5.pdf)
[kk] *Roe v. Wade*, 410 U.S. 113, 157 (1973)

not just scientific evidence, technology may be the undoing of portions of *Roe*. It is important to note, however, that life-saving and life-extending technology does not guarantee the quality of life or that a pre-term infant will survive at all. It could be argued that the desire to preserve life, at any stage, is not to ensure a life that can be lived in dignity rather it is to require that life is continued – no matter the cost.

The pro-life and personhood movements have been accused of caring only about the life within the womb and to ensure that the fetus is born – regardless of the circumstances or wishes of the mother. Take for instance the 2004 federal Unborn Victims of Violence Act[II], the act specifically adds penalties for crimes committed against a fetus – but not the pregnant woman herself. (ACOG Committee on Ethics, 2005) The activists are now being termed pro-birth, as many people in America work to reclaim the term pro-life. There are few among us who can be deemed to be against life, to willfully wish that it ceased. Pro-birth refers to those who, under the guise of protecting the unborn from abortion and other forms of violent crime, do everything in their power to change policies that ensure every conception leads to a birth. However, their concern for the infant ends once it is born – they are often less concerned about housing, feeding, or clothing a child. Those who are pro-birth also tend to be less inclined to support subsidized pre-natal care, birth control or comprehensive sex education. Pro-birthers are overwhelmingly Republican, Evangelical and would like to see the repeal of the Affordable Care Act – a law that mandates pre-natal coverage and reproductive health care services. (Burke et al., 2016)

[II] 18 USC §1841; 10 USC §919a

Pro-birth is a term just being introduced to the social consciousness and utilized by social justice activists and those who wish to take back the term pro-life.[mm] It is being used in discussions and rarely in the media – it does not have a presence in academic literature – many activists are hopeful that there will be a paradigm shift away from "pro-life" and toward "pro-birth." In 2004, Catholic Nun and scholar Joan Chittister, PhD. was part of a panel on NOW with Bill Moyers where discussion centered on Christian evangelicals and their role in electing George W. Bush, participants debated the following question: "Christian evangelicals helped elect President Bush. But what happened when moral values are carried into the public square?" Naturally, the discussion touched on abortion – one of the biggest wedge issues in American politics. Sister Joan replied:

> The fact of the matter is that they're all in contention with something else which is also a moral value and also equally important unless you put it completely out of your mind or your heart. For instance, let's look at the abortion question. I'm opposed to abortion. But I do not believe that just because you're opposed to abortion that that makes you pro-life. In fact, I think that in many cases, your morality is deeply lacking. If all you want is a child born but not a child fed, not a child educated, not a child housed and why would I think that you don't? Because you don't want any tax money to go there. That's not pro-life. That's pro-birth. We need a much broader conversation on what the morality of pro-life is. (Moyers, 2004)

Naturally, the questions surrounding abortion are based on moral value judgments. Similarly, moral values have been carried into the public square when it

[mm] In July 2015, Pro-Choice Liberals shared a little known quote from Sister Joan Chittister on their Facebook page. The quote was then shared by The Daily Kos, moving it into current social justice circles. (http://www.dailykos.com/story/2015/7/30/1407166/-Catholic-Nun-Explains-Pro-Life-In-A-Way-That-May-Stun-The-Masses) and The Huffington Post. Its origins, however, were in a 2004 interview on PBS.

comes to how we treat pregnant women. By treating pregnant women as a third class of citizens – those who cannot make medical decisions for themselves – we fail to recognize that they are individuals in their own right creating an unnatural conflict between mother and fetus. (ACOG Committee on Ethics, 2005; Kaplan, 2011) The American College of Obstetricians and Gynecologists (ACOG) have posited the theory that woman and fetus are treated as separate individuals because of medical and technological advancements, wherein one but not both mother and fetus can receive life-saving treatment. They believe that instances where women are punitively charged with crimes after refusing to undergo a medical treatment like a cesarean delivery, "were motivated by a shared concept – that a fetus can and should be treated as a separate and legally, philosophically, and practically independent from the pregnant woman within whom it resides." (American College of Obstetricians and Gynecologists, 2005)

While often made with the best evidence at the time, physicians and medical decisions can be fallible and what holds true for one patient cannot be said to be true for all other patients. (American College of Obstetricians and Gynecologists, 2005; Wilcox, 2010) This is particularly true in a country that overwhelmingly practices defensive medicine. Appellate courts have held that a pregnant woman's decisions regarding medical treatment must take precedence over any presumed consequences that the fetus may face. In their 1990 decision, the Court of Appeals for the District Court of Columbia Circuit vacated an earlier ruling wherein a lower court compelled a cesarean delivery of a 26-week-old fetus against the wishes of a critically ill pregnant

woman, Angela Carder. Ms. Carder, dying from cancer, was forced to undergo a cesarean delivery against her wishes and the wishes of her family. Both she and the baby died. While symbolic for Ms. Carder, the decision by the appellate court three years later is significant for all pregnant women in America. (Minkoff & Lyerly, 2010)[nn] However, not ten years after *In re A.C.*, Laura Pemberton, a woman in active labor at her home in Florida, attempted a sometimes-controversial vaginal birth after cesarean delivery. Physicians were aware of her status and sought a court order to force her to undergo a cesarean delivery. (L. M. Paltrow, 2013) Pemberton went on to given birth vaginally to three more children. "Twenty years after *In re A.C.* constraints on the rights of potential mothers for the sake of fetuses often are more pronounced than those on actual parents for the sake of born children." (Minkoff & Lyerly, 2010)

Culpability for Murder and Criminal Negligence

The common law tradition determined that culpability for murder could legally be established when the baby was born alive. (Fentiman, 2006) In the seventeenth century, Lord Coke enumerated English common law principles in The Institutes of the Lawes of England, and described the born-alive rule as one where it is a great travesty when a child is stillborn, but a murder cannot be committed against the child unless it is born alive. Culpability for murder was recognized when common law established the actus reus, literally a wrongful act, had been committed against a "reasonable creature, in rerum natura" or "a life in being." (Fentiman, 2006) Under common law, the umbilical

[nn] *In re A.C.*, 573 A.2d 1235 (D.C. 1990)

cord must be severed and the infant must draw breath, thus becoming a life independent of its mother. The period of gestation, or viability, is not taken into account; rather, it is the act of the infant drawing breath. Only then can a subsequent action by the mother (or others) be considered murder. Upending this long-standing tradition in the United States have been piecemeal legal rulings and new legislation[oo] defining a wrongful criminal act committed against a pregnant woman (and thus her fetus), or independently against a fetus in utero (in cases where the woman herself is culpable of said wrongful act). In the eyes of many states' fetal homicide laws a fetus is a person. Therefore, for the purposes of arrest and prosecution an outside actor can be charged with manslaughter or murder. (National Council of State Legislatures, 2015)

One such landmark case was the 1984 Supreme Judicial Court of Massachusetts ruling in *Commonwealth v. Cass*.[pp] The majority ruled that a viable fetus met the definition of a "person" under the state's vehicular homicide law. Chief Justice Hennessey wrote that the determining factor for whether or not a medically viable fetus would be legally recognized as a person was wholly a question of the legislative intent of the vehicular homicide law.

Citing *Mone v. Greyhound Lines*[qq], Hennessey wrote, "We found 'neither reason nor logic in choosing live birth over viability,' and we stated that 'conditioning a right of

[oo] *The Unborn Victims of Violence Act of 2004* (18 U.S.C. § 1841, 10 U.S.C. § 919a); States' Fetal Homicide Laws, http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx (Accessed September 16, 2015)

[pp] *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984)

[qq] *Id.* at 801 (*Mone v. Greyhound Lines*, 368 Mass. 354 (1975)) The justices in *Mone* unanimously agreed that a viable fetus would be considered a person for purposes of the Massachusetts wrongful death statute. In *Comm v. Cass,* Hennessey, writing for the majority, noted that while it was "unanimously

action on whether a fatally injured child is born dead or alive is not only an artificial and unreasonable demarcation, but unjust as well." The opinion continues:

> In keeping with an approved usage, and giving terms their ordinary meaning, the word 'person' is synonymous with the term 'human being.' An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb…heretofore the law has not recognized that the pre-born could be victims of homicide because of difficulties in proving the cause of death; but problems in proving causation do not detract from the personhood of the victim.[rr]

In the three decades since Cass, 38 states have codified "fetal homicide" laws, and at least 23 of these have fetal homicide laws that apply to the earliest stages of pregnancy (e.g. any stage of gestation, conception, fertilization, or post-fertilization). (National Council of State Legislatures, 2015) While the original intent of these laws may not have been to erode Roe[ss], judicial and legislative recognition of when life begins, for the purpose of fetal homicide laws, has been shifting from viability to conception. Supporters of these acts, often pro-birth advocates, frame these laws as protection for women and unborn children. However, it is a slippery slope toward not only overturning Roe, by limiting women's rights and ability to choose abortion, but also to prosecute pregnant women themselves once they have suffered a pregnancy loss.

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agreed that a viable fetus is a person for the wrongful death statute, three of the seven Justices concluded that the decision should be applied prospectively only." *Mone* at 364-365; *Id*. at Supra note 2 at 810

[rr] *Id.*

[ss] The intent of fetal homicide laws was not to take punitive action against pregnant women or for the express goal of outlawing abortion. There is a visceral and human reaction to the death of a woman and her viable fetus at the hands of a culpable criminal – think of a woman who is murdered and her pregnant belly stabbed repeatedly – we wanted to ensure that heinous crimes were appropriately punished. As a society, we believed and continue to believe, that a crime committed against a pregnant woman is particularly heinous and thus deserves an extra measure of punishment.

Once a rare occurrence, women are increasingly being arrested for pregnancy-related behavior that is considered harmful to their fetuses. (L. M. Paltrow, 1990) In the bitterest form of irony, for some women who are accused of pre-natal abuse their only option is abortion.[tt] In 1992, a homeless twenty-eight year old Native American woman, Martina Greywind, was arrested in Fargo, North Dakota, when she was twelve weeks pregnant. "She was charged with reckless engenderment, based on the claim that by inhaling paint fumes she was creating a substantial risk of serious bodily injury or death to her unborn child." (L. M. Paltrow, 2013) While jailed, Greywind was able to obtain an release for a medical appointment and had an abortion. The state dismissed the charges against Greywind stating, "The defendant has made it known to the state that she has terminated her pregnancy. Consequently, the controversial legal issues are no longer ripe for litigation."[uu]

Fetal homicide laws often specifically preclude the mother from being legally culpable when harm is caused (i.e. a woman cannot be blamed for an adverse outcome, such as death or genetic abnormality or in obtaining a legal abortion). Additionally, they don't confer all rights of personhood – for that, specific fetal personhood legislation is necessary. Yet this has not stopped prosecutors or the courts in many jurisdictions from attempting to shift the fault to women themselves by utilizing statutes not intended for

[tt] Women prosecuted and sentenced for pre-natal abuse, and/or feticide (as in the case of Bei Bei Shui who was convicted of two usually mutually exclusive crimes – feticide and child abuse), face jail time and/or often the removal of their infant to state care depending upon the circumstances of the case. However, only those women who have chosen to carry their pregnancy to term can be tried for such crimes. If a woman facing these kinds of charges has an abortion, then she can no longer be prosecuted for abusing her fetus. This irony angers those in the pro-life/pro-birth movement, giving them additional moral ammunition to ban abortion. (L. M. Paltrow, 1990, L. M. Paltrow, 2013)

[uu] *State v. Greywind*, No. CR-92-447 N.D. Cass County Ct. Apr. 10, 1992 (L. M. Paltrow, 2013)

fetal protection to be applied to a fetus as if it were an independent person or child. Applying child abuse statutes to fetuses is a legal tactic being used to make an end run around having additional legislation defining personhood. Charging and prosecuting women for 'crimes' against their fetuses is developing a body of legal precedent.

Alabama Supreme Court Justice Matthew Parker has made it his personal mission to almost singlehandedly establish precedent for overturning Roe on the grounds of fetal personhood. While Alabama's high court decision may not have a direct legal impact upon other states, Justice Parker is modeling behavior that other activist judges could emulate. He is attempting to create the perfect storm: where a case or controversy challenging Roe, on the grounds that personhood has been legally established, could be taken to the US Supreme Court.[vv]

This is a catch-22: under the Supremacy Clause of the Constitution, states cannot grant personhood to a fetus, as the Supreme Court has clearly ruled that a fetus is not a "person."[ww] Scholars have noted, "If a legislature attempted to establish natural fetal personhood, its law would simply have no effect unless Roe's essential holding was overturned." (Crist, 2010) However, others have challenged that this may be questionable, if a state did grant fetal personhood – as Tennessee has done – and the state's abortion law was challenged then the court would have to directly confront the

[vv] Personhood was not conferred on the fetus by the *Roe* court, and in other criminal and torts cases fetal "personhood" has been juridical personhood, rather than natural personhood. For personhood to be granted federally, Roe must be overturned. Therefore, to some Justice Parker's work would be moot, as the only way challenge on the ground of personhood should rightly be made is as a challenge to legislation specifically written to confer all rights and responsibilities of personhood to a fertilized embryo or fetus. Tennessee became the first state to 1) confer full-fledged personhood 2) and state that there is no legally protected right to abortion. TENN. CODE ANN. § 39-13-107 (2015); (Crist, 2010)

[ww] *Roe v. Wade*, 410 U.S. 113, 158 (1973); (Crist, 2010)

issue of personhood, something it did not have to do with *Roe*. (Krause, 2015) If the Court were to construe a state law to the contrary of the original ruling in *Roe*, it is uncertain how loyal the Court would be to this aspect of *Roe*. (Krause, 2015) Let us return to Justice Parker, because if the Court decides to take up the issue of personhood with respect to Roe, Parker's opinions could thus be used as judicial precedent to re-examine the Court's rulings on personhood. It must be noted that Parker's rulings are not binding upon the Court, the precedent established is binding only upon the courts in Alabama; however, this precedent can be taken into account by the Court if they so choose. His body of work affirming the establishment of natural fetal personhood in utero is twofold: writing opinions for the majority and taking the unusual step of authoring an additional concurring opinion. He has been creating a robust body of citable work supporting ideological fetal personhood.[xx] (Martin, 2014) As recently as 2011, Alabama law only allowed wrongful death suits to proceed when the fetus was viable. In *Hamilton v. Scott*[yy], the court struck down that limit, with Parker writing for the majority and authoring an additional concurrent opinion. Justice Parker has continued to use his position to undermine legal abortion, growing a body of legal precedent that can be cited and re-cited, often finding ways to take seemingly unrelated cases to argue for full legal personhood rights for the unborn. Parker has utilized additional evidence that a fetus already has personhood-like rights conferred upon it: inheritance rights, the prohibition on executing pregnant inmates, laws that give fetuses a guardian ad litem to protect its interest and laws that allow parents to sue for damage

[xx] *Ex Parte Ankrom* 152 So. 3d 397 – Ala: Supreme Court (2013)
[yy] *Hamilton v. Scott*, 97 So. 3d 728 - Ala: Supreme Court (2012)

if a fetus is injured or killed as the result of negligence. "Today, the only major area in which unborn children are denied legal protection is abortion and that denial is only because of Roe."[zz] This is the path to overturning *Roe*: members of the judiciary and legislature creating an ideological paradigm shift that is rooted in a body of legal precedent and case law. (Forsythe, 2012)

The movement to recognize the unborn as children in their own right, and thus separate from the mother, has manifested in states using child abuse laws to prosecute pregnant addicts for delivering drugs (illegal) or alcohol (legal) to their fetuses in utero. While the American Medical Association recognizes addiction as a disease, the majority of Americans are not sympathetic to the plight of drug users. Targeting pregnant drug users has been an ingenious move on the part of the anti-choice/pro-birth movement – drugs are bad, giving drugs to children is bad, thus pregnant drug users are bad and ought to be punished. Pregnant women suffering from addiction lack sympathy from the general public: rather than nurture the life inside them they are potentially causing harm and resulting sequelae. On the other hand, rather than receiving the treatment and pre-natal care that they need women are being criminalized, jailed and ostracized by society. Treating pregnant drug addicts as pariahs, by requiring physicians to report potential, suspected or actual drug or alcohol use to authorities, means the group most in need of medical care may delay or forego that care altogether. (Flavin & Paltrow, 2010) There is growing concern from the medical community that punitive fetal protection laws discourage women from seeking care, and ultimately may cause more

[zz] *Id.*

harm than good. (ACOG Committee on Ethics, 2005; Berrien, 1989; Chavkin, Paltrow, Abel, & Kruger, 2003)

Let us return to the idea that it is a very human prejudice to want to blame someone when something goes wrong. Physicians, law enforcement, the judiciary, and public health practitioners all have a duty to protect and prevent harm. How do we balance the need for children to be born healthy and for mothers to have safe and respectful maternal care, against the liberty of the mother and our democratic principles that establish that a person cannot be compelled to use their own body to save another's life?[aaa]

When fetal homicide laws are used to blame the mother for the death of the fetus – whether there was an intentional act on her part, or the mistaken belief that she did not do enough to protect her fetus then her liberty is being denied. However, can it be said that these laws are all bad? We have a visceral reaction to hearing that a visibly pregnant woman was beaten to death; most of us would want their killer to be tried for two murders. When the mother survives and her viable fetus does not, perhaps after a brutal attack by another's hand is it not right for her to be able to see justice for the killing of her viable but unborn child? It is a question of balance – but it is only a question of balance while a non-viable fetus is not considered a legal person, with all of the rights and responsibilities conferred upon it. Once personhood is conferred, a legal imbalance in the maternal-fetal relationship is established.

[aaa] *McFall v. Shimp* 10 Pa.D&C 3d 90 – Pa: Court of Common Pleas (1978)

Part IV

This author is concerned that we are continuing to move further away from two principles seemingly at odds with one another – personal liberty and the responsibility of societies to care for those among us least able to do so. We are surrounded by a field of politicians more interested in grandstanding and polemics, using the rhetoric of hate to divide Americans over our nation's biggest wedge issue: abortion. We are not a one-issue country; most American's don't fall into a binary of Pro-Choice or Pro-Life. (Kliff, 2015) Today, as throughout all of our history, there is more that unites us than divides us; more Americans fall into the middle in the abortion wars, stating that they are either, neither or both Pro-Life and Pro-Choice. (Kliff, 2015) This proves yet again that we are a nation of contradictions, continually testing the democratic experiment that is America.

While our eyes are on abortion, little by little women's liberties are being rolled back and fetal and embryonic rights are increasing. This is happening without the full knowledge of Americans; media coverage has been laughable with Pro-Life advocates praising the actions of law enforcement while Pro-Choice activists have been concerned with abortion, not the chipping away of women's liberty that could lead to the overturning of *Roe*. We could find ourselves in an America where the policy of Congress is to again forbid the use of contraceptives.[bbb] Strategic coordinated steps are being taken that will mean losing access to contraceptive methods like the pill, implants and

[bbb] The Comstock Act 17 Stat. 598

IUDs.[ccc] Hormonal contraception has specific mechanisms of action, 1) to thicken the cervical mucosa and therefore create a barrier that sperm cannot pass through, 2) to disrupt and prevent regular ovulation and 3) to thin the endometrial lining so that if mechanism one fails and sperm enter the uterus and fallopian tubes and if mechanism two fails and an egg is present, then the fertilized egg will have no place to implant and therefore a pregnancy cannot be established. (Hatcher et al., 2011) If American jurisprudence accepts that life begins at conception we will again be a nation that outlaws contraception.

Without equitable health care and full access to contraception[ddd], Learned Hand's 1936 concurring opinion in *U.S. v. One Package* is still relevant today. Access to contraception and it being legally available are, of course, different. However, decisions such as the Supreme Court's in *Burwell*[eee] and those concerning pharmacists' ability to refuse to dispense medications are comparable to abortion being legally available but not actually accessible.

Until the United States has a health system that provides ample support for prevention, we will be left with the contradiction that Justice Hand's opinion so eloquently describes. It is unreasonable that our nation's legislation not only was, but also is, so inconsistent with our value of liberty. It was not enough to simply legislate pregnancy and contraception away from the sphere of women and into that of medicine. Now, against the weight of authority in the medical world, lawmakers want to

[ccc] These effective and highly utilized forms of contraception, while not abortifacients in any medical or clinical definition, could though one of their mechanisms of action prevent a fertilized egg from implanting in the uterine wall.
[ddd] *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.Ct. 2751 (2014)
[eee] *Id.*

legislate the right to make personal medical decisions away from the sphere of the 'physician patient relationship,' placing that decision-making ability within the sphere of the lawmaker. Lawmakers, law enforcement and the judiciary are upending foundational common law principles and rulings that have consistently said 1) a person cannot be compelled to use a part of his or her body to save another[fff] and 2) fetal homicide laws were not written (and indeed there often is an exclusion) so that the pregnant woman herself could be arrested, prosecuted, and jailed for the loss of her pregnancy. (National Council of State Legislatures, 2015)

The ACOG Committee on Ethics has summed up the issues most eloquently:

> This opinion…considers six objections to punitive and coercive legal approaches to maternal decision-making. These approaches 1) fail to recognize that pregnant women are entitled to informed consent and bodily integrity, 2) fail to recognize that medical knowledge and predictions of outcomes in obstetrics have limitations, 3) treat addiction and psychiatric illness as if they were moral failings, 4) threaten to dissuade women from prenatal care, 5) unjustly single out the most vulnerable women, and 6) create the potential for criminalization of otherwise legal maternal behavior. (American College of Obstetricians and Gynecologists, 2005)

We expect Congress to ensure the safety of the nation, to keep the lights on and the water clean, not to make medical decisions for us. It may be a very human prejudice – wanting to blame someone. Rather than a positive, solutions-based discourse designed to ensure better health outcomes for mothers and their children, not just during pregnancy and delivery, but also throughout the life course, our system is aimed

[fff] *McFall v. Shimp* 10 Pa.D&C 3d 90 – Pa: Court of Common Pleas (1978)

at blame. Criminalizing women creates an unnatural tension between a woman and her fetus, ultimately putting the health of both at risk.

Conclusion

Blind adherence to laws of the past, due to tradition or so-called judicial restraint, can be harmful to society. As Justice Oliver Wendell Holmes explained in an 1897 address:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[ggg]

Holmes understood that the law was, and is, a living thing – it must change with the advances of society. Neo-conservatives like Americans United For Life encourage jurists and legislators alike to break with the common law traditions the United States was founded on and reactively protect the unborn, often at the expense of pregnant women. (Burke et al., 2016; Forsythe, 2012; Paltrow, Lynn M., et al., 2011) While the law is a malleable thing it cannot protect the interests of pregnant women, the unborn and society without effective policies that make provision for contraceptive access, mental healthcare, pre-natal care, safe intra-partum care, and post-partum care. Legislating fetal protections and imposing judicial precedent that ignores the health-care needs of pregnant women in the face of a health care landscape so devoid of access to full-spectrum reproductive health care is short-sighted and is creating an

[ggg] Oliver Wendell Holmes, Justice of the Supreme Judicial Court of Mass., The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 469 (1897).

environment where maternal fetal conflict may become the norm in a society that practices defensive medicine. We must remember that the needs of pregnant women and the needs of the unborn necessarily converge. When we neglect to provide adequate health care we as society are the negligent actors – culpable for the loss of both pregnant women and their fetuses. Our negligence is only reinforced by juridical practices and legislation that rob pregnant women of bodily integrity and liberty.

The actions on the part of lawmakers, law enforcement, and the judiciary over the past two decades have undermined women's liberty and their right to bodily autonomy. Twenty years after the ruling in *In re AC* women still lack the fundamental right to bodily integrity, "in virtually all cases the question of what is to be done is to be decided by the patient – the pregnant woman – on behalf of herself and the fetus."[hhh] It is a sad state of affairs when women have to ask yet again, "How long must women wait for liberty?"

[hhh] *In re A.C.*, 573 A.2d 1235 (D.C. 1990)

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